75-1668

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

THE INCORPORATED VILLAGE OF ROSLYN HARBOR, ROBERT LISLE, JOHN YOST, JOHN COLLINS, FRANK FAHNESTOCK and WILLIAM DeNEERGAARD, constituting the Board of Trustees of the Incorporated Village of Roslyn Harbor,

Petitioner,

against

THE JEWISH RECONSTRUCTIONIST SYNAGOGUE OF THE NORTH SHORE, INC.,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI

JOHN M. FARRELL, JR.,
Attorney for Respondent
98 Cutter Mill Road
Great Neck, New York 11021

SCHIFFMACHER, CULLEN & FARRELL
Of Counsel

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Question Presented

The only issue raised by this petition is whether there is a substantial federal question which has not been previously determined by the Supreme Court or decided in a way not in accord with its decisions. (Rule 19 of the Rules of the Supreme Court of the United States.)

The existence of a substantial federal question must be gleaned from the issue decided in this action by the Courts of the State of New York. The Court of Appeals in its decision resolved three questions:

1. Whether a municipality can, by the enactment of a local ordinance, abridge the power to grant variances given

to boards of zoning appeals by the legislature of the State of New York. The Courts below answered this question in the negative.

2. Whether, considering the facts of this case, those provisions of the Building Zone Ordinance of the Incorporated Village of Roslyn Harbor (hereinafter referred to as the Zoning Ordinance) which state that a building housing a religious use is to be set back 100 ft. from the side line of the property on which it is built, can be declared to be unreasonable and invalid when such provisions are unsupported by sufficient evidence to justify their application. The courts below answered this question in the affirmative.

3. Whether standards imposed in a zoning ordinance as conditions for the grant of a special exception can be unconstitutional when applied to deny a church or synagogue the use of its property for religious purposes. The courts below answered this question in the affirmative.

Respondent maintains that none of these issues raise a substantial federal question and, as a result, this petition should be dismissed.

Statement of Facts

The decision of the Court of Appeals of the State of New York, which is sought to be reviewed by this petition for a writ of certiorari is the culmination of over five years of litigation involving the right of respondent to construct a synagogue on its property on the west side of Glenwood Road in the Incorporated Village of Roslyn Harbor, which is located on the north shore of Long Island, in Nassau County, New York.

Respondent purchased its property consisting of approximately 2½ acres of land improved with a large one-

family colonial type dwelling and a smaller cottage on October 29, 1970 (28a and 29a).* In February 1971 an application was made to the Board of Appeals of the Incorporated Village of Roslyn Harbor for a conditional use permit and variances so that respondent could use the colonial house for its synagogue and the cottage as a residence for its rabbi (35a). The conditional use permit was requested because § 11-2.14 of the Zoning Ordinance makes churches, schools and non-profit clubs special exceptions throughout the Village. That section also requires buildings used for those purposes to be 150 ft. from the street and 100 ft. from any side or rear property line.

The standards and conditions for the granting of a special exception are contained in § 11-2.30 of the Zoning Ordinance. One of the standards there enumerated is that the Board of Appeals can grant a special exception only if all the buildings and structures which are the subject of the use permit are in conformity with the height, area and yard requirements of the Zoning Ordinance. (The applicable zoning ordinances are set forth at pp. 3a through 5a of Appendix 1 to the Petition for a Writ of Certiorari).

Respondent's property is located in the Residence A District of the Village in which single family dwellings on plots of at least one acre are permitted uses (30a). The principal residence is set back 29.6 ft. from the southerly property line of respondent's property and when occupied as a one family dwelling, was in full compliance with all applicable provisions of the Zoning Ordinance, the side yard set back provisions for such use being 25 ft. However, because § 11-2.14 of the Zoning Ordinance requires structures used for religious purposes to be set back 100 ft. from a side line, respondent required a variance in order to use

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* Unless otherwise indicated, this and other references are to pages in the Record on Appeal to the Court of Appeals of the State of New York.

the main dwelling for its synagogue. At the same time that respondent applied for the special exception and side yard set back variance, it also asked that the Board grant a variance of § 4-10.2 of the Zoning Ordinance which requires all accessory structures to be located in the rear yard, because the cottage which is to be used for the residence for respondent's rabbi, when so occupied, becomes an accessory structure located in the front yard of the synagogue (36a).

Respondent's applications were the subject of three lengthy hearings before the Board of Appeals, starting in April and ending in June, 1971 (39a). At these hearings, detailed testimony was introduced as to the effect of the proposed use on property values in the area, whether any change in the character of the neighborhood would occur and how the use of the property as a synagogue would influence existing traffic patterns (101a through 106a).

In November, 1971, the Board of Appeals denied the special exception and the variances on the grounds that (a) it lacked the authority to grant any variance to respondent because § 11-2.30 of the Zoning Ordinance authorized a Board to grant a special exception for a religious use only if there were full compliance with all of the area requirements of the Zoning Ordinance and (b) had the Board of Appeals the authority to grant such a conditional use permit it would have denied it to respondent, in any event (112a and 113a).

Respondents thereafter commenced a proceeding brought pursuant to Article 78 of the Civil Practice Law and Rules of the State of New York in Supreme Court, Nassau County, to review and annul the determination of the Board of Appeals. This proceeding was dismissed on the ground that the Board of Appeals did not have the jurisdiction to grant the relief sought because it lacked the authority to vary the provisions of the Zoning Ordinance in conjunction with an application for a conditional use permit for

religious purposes (decision of Supreme Court unreported) and the Appellate Division, Second Department, affirmed that judgment, with two justices dissenting (41 A. D. 2d 537). An appeal to the Court of Appeals of the State of New York resulted in an affirmance of the determination of the lower courts, that Court in its memorandum decision, noting that a declaratory judgment action was pending in which "all the issues would be ventilated" 34 N.Y.2d 827, 829. The declaratory judgment action to which the Court of Appeals referred was an action commenced by respondent to declare those provisions of § 11-2.30 of the Zoning Ordinance unconstitutional which imposed standards on a special exception for a church or synagogue and which deprived the Board of Appeals of the authority to grant a conditional use permit, if the applicant also requested an area variance. Respondent also requested a declaration in that action that the 100 ft. side yard set back provisions of § 11-2.14 of the Zoning Ordinance were, as they applied to respondent's property, unconstitutional (pp. 26a through 122a).

After a trial at Supreme Court, Nassau County, Mr. Justice Robert C. Meade rendered a decision granting respondent the declaratory relief it requested. (Mr. Justice Meade's decision is Appendix No. 1 to the Petition for a Writ of Certiorari). Petitioner appealed to the Appellate Division, Second Department of the Supreme Court of the State of New York, which unanimously affirmed Mr. Justice Meade's decision and the judgment entered thereon without opinion (Appendix No. 3 to the Petition for a Writ of Certiorari). Petitioner thereafter appealed to the Court of Appeals of the State of New York and it is from the decision of that Court that this petition is brought.

ARGUMENT

POINT I

The determination of the courts of the State of New York that a municipality cannot enact a Zoning Ordinance that applies invariable area restrictions to religious uses does not present a substantial federal question.

The decision of Mr. Justice Robert C. Meade at Supreme Court, Nassau County (Appendix No. 1) held that the provisions of § 11-2.30 of the Zoning Ordinance which forbade the Board of Appeals from granting a special exception to a church or synagogue unless there were full compliance with the area requirements of the Zoning Ordinance, including the provisions of § 11-2.14 thereof, which mandated a 100 ft. side yard set back, to be unconstitutional because the Village was, by local ordinance, abridging the legislative grant of power conferred upon boards of appeals in § 179-b (now § 7-712) of the Village Law of the State of New York (p. 10a of Appendix No. 1). Judge Fuchsberg, writing for the majority of the Court of Appeals, found the inflexible area requirements of the Zoning Ordinance offensive, when applied to religious uses (p. 26a of Appendix No. 5 to the Petition for a Writ of Certiorari).

The conclusion of all the courts of the State of New York was that the invariability of the Zoning Ordinance made it unconstitutional. Whether the reasons for such a finding of unconstitutionality were the illegal restriction of the powers of the Board of Appeals or the failure of the Zoning Ordinance to attempt to accommodate to religious uses, it cannot be said that the basis for the determination was that the Zoning Ordinance infringed upon the free exercise of religion. Accordingly, no substantial federal question is presented with respect to this issue.

POINT II

No substantial federal question is presented by the finding that the 100 ft. side yard restriction in § 11-2.14 of the Zoning Ordinance, is unreasonable, when applied to the synagogue property.

The Court of Appeals held that the application of the 100 ft. side yard set back provisions of § 11-2.14 of the Zoning Ordinance, when applied to respondent's property, was, under the circumstances presented in this case, unreasonable, Judge Fuchsberg saying:

> "Nor is invariability the only evil in the ordinance. Its application to the synagogue in this case is not supported by sufficient evidence to justify it. While there is, in the record, only some indication that there may be traffic or noise-related inconvenience to the synagogue's immediate neighbors, or problems with fire protection, there is no hard evidence to that effect nor that any effort was made to find ways to mitigate these inconveniences short of outright denial of the variance. While this no doubt stems from its intransigent nature, which denied the board power to modify it for any reason, that does not mean we must simply remit this case for further findings as to what set-back if any, is a reasonable one. As already indicated, the existing building which the synagogue wishes to use already sits, as it has for a long time, some 29 feet from the property line. Given this record, the question which the Village must answer is not whether 29 feet is reasonable, but rather, what reasonable measures can be taken to mitigate the effect upon the neighbors of having a synagogue 29 feet from the property line.

The record makes clear that the village's objections to the location chosen by the synagogue are founded on no more than perceived inconvenience. The village's own ordinances reflect a policy which labels acceptable

a distance of 125 feet between a religious building and the nearest residence, since these ordinances permit a residence to be located 25 feet from its property line and would permit a church to be located 100 feet from its property line. The record discloses, that, in fact, the nearest house is 106 feet away from the synagogue building. Requiring the synagogue to observe the 100 foot setback in these circumstances would place it some 177 feet away from the nearest house, or, put it another way, the village's determination to exclude the synagogue is based on a mere 19-foot discrepancy between reality and the village's own statutory ideal. Since the cost to the synagogue of moving the building or constructing new facilities in its place is greater than it can afford, such a requirement would be tantamount to a denial of the use permit." (pp. 26a to 28a Appendix 5 to Petition for a Writ of Certiorari).

It is obvious from this language that the court's determination was a factual one confined to the situation presented in this case, that it involved no constitutional issue, and, consequently, it embraced no federal question.

POINT III

The holding by the Court of Appeals that the standards of § 11-2.30 of the Zoning Ordinance cannot be employed to exclude religious uses from residential districts of the Village of Roslyn Harbor, involves a question of public policy of the State, not the First Amendment guarantee of the right to free exercise of religion.

If there is the germ of a federal question in any of the issues decided by the Court of Appeals, it is the holding by that Court that the standards contained in § 11-2.30 of the Zoning Ordinance can not be applied to exclude respondent from its property in the Village of Roslyn Harbor. However, a capsule review of the decisions of the states holding apparently conflicting views on this and related points will show that if a conflict in the decisional authority does exist, it is not in the area of the Court of Appeals decision because what the Court of Appeals decided, was a policy question not a federal constitutional issue.

It is the general consensus that a municipality cannot enact a land use ordinance that completely excludes religious uses. *North Shore Unitarian Society* v. *Plandome,* 200 Misc. 524, 109 N.Y.S.2d 803; *State ex rel. Lake Drive Baptist Church* v. *Village of Bayside Board of Trustees,* 12 Wisc.2nd 585 108 N. W. 2nd 288; Anderson, American Law of Zoning, § 9.19). However, a dichotomy does exist with respect to whether a municipality can exclude a religious use from a residential district or districts in a municipality. The majority view, which is followed by the State of New York, is that religious uses may not be excluded from residential districts. *Matter of Diocese of Rochester* v. *Planning Board,* 1 N.Y.2nd 508, 136 N.E.2nd 827; *Matter of Community Synagogue* v. *Bates,* 1 N.Y.2d 445, 136 N.E.2d 488; *Matter of Westchester Reform Temple* v. *Brown,* 22 N.Y.2d 488, 239 N.E.2nd 891; *State ex rel. Synod of Ohio* v. *Joseph,* 139 Ohio St. 229, 39 N.E.2d 515; *Congregation Dovid ben Nuchim* v. *Oak Park,* 40 Mich. App. 698, 199 N.W.2d 557; *Board of Zoning Appeals* v. *Decatur Company of Jehovahs Witnesses,* 233 Ind. 83, 117, N.E.2d 115; *State ex rel. Lake Drive Baptist Church* v. *Village of Bayside Board of Trustees, supra; Anderson American Law of Zoning, § 9.19.* On the other hand, California and Florida espouse the minority view that a municipality may exclude religious uses from certain residential areas. *Corporation of Presiding Bishop of Church of Latter Day Saints* v. *City of Porterville,* 90 Cal. App. 2nd 656, 203 P. 2nd 823, app. dism., 338 U.S. 805; *Minney* v. *Azusa,* 164 Cal.App. 2nd 12, 330 P. 2nd 255 app.

dism. 359 U.S. 436; *Miami Beach United Lutheran Church* v. *Miami Beach,* 82 So.2nd 880. Contrary to petitioners contention, neither the constitutionality nor the propriety of the majority or minority view is at issue in the instant case. Because § 11-2.14 of the Zoning Ordinance provides that a church or synagogue is condtionally permitted throughout the Village of Roslyn Harbor, there is no question as to whether a church can constitutionally be excluded from a residential district.

The specific point presented is what standards and conditions can be applied to control a conditionally permitted religious use. The majority, concurring and dissenting opinions of the Judges of the Court of Appeals in this case, are a microcosm of the differing views prevailing in various states. The majority decision of the Court of Appeals is a reaffirmation of the New York rule, expounded in *Matter of Diocese of Rochester* v. *Planning Board of Brighton, supra; Matter of Community Synagogue* v. *Bates, supra; Matter of Westchester Reform Temple* v. *Brown, supra,* that a municipality may impose reasonable regulations on a religious use, but as Judge Kenneth Keating said in *Matter of Westchester Reform Temple* v. *Brown, supra,* at pp. 496 and 497:

> ". . . We have not said that considerations of the surrounding area and potential traffic hazards are unrelated to the public health, safety or welfare when religious structures are involved. We have simply said that they are outweighed by the constitutional prohibition against the abridgement of the free exercise of religion and by the public benefit and welfare which is itself an attribute of religious worship in a community. If the community can, consistent with this policy, both comply with the constitutional requirement, and, at the same time, avoid or minimize, insofar as practicable, traffic hazards or other potential detriments bearing a substantial relation to the health, safety and welfare of the community, there is no barrier of its doing so. Nevertheless, we have already decided in the Rochester case that, where an irreconcilable conflict exists between the right to erect a religious structure and the potential hazards of traffic or diminution in value, the latter must yield to the former."

Under this rule, standards in a Zoning Ordinance that permit a special exception can be granted for a religious use only if it is found that the religious use will not tend to depreciate property values, will not create a hazard to health, safety, morals and the general welfare, will not alter the essential character of a neighborhood, will not be detrimental to public convenience and welfare or will not be feasible in a less restricted district cannot be constitutionally applied to exclude such use.

Other states, typified by Oregon in *Milwaukie Company of Jehovah's Witnesses* v. *Muller,* 214 Or. 281, 33 P.2nd 5, app. dismissed and cert. denied 359 U.S. 436 and Connecticut in *West Hartford Methodist Church* v. *Zoning Board,* 143 Conn. 263, 121 A.2d 640, have held that conditionally permitted religious uses are subject to the same standards as other uses and a special exception can be denied if for example, it is proved that the religious use will cause injury to neighboring property or result in traffic hazards or congestion.

The dissenting opinion of Judge Jones in the Court of Appeals would have the State of New York follow Oregon and Connecticut. The concurring opinion of Judge Breitel advocates a middle of the road policy that would give religious institutions some limited priorities.

The existence of this diversity of outlook as to whether religious institutions are to be accorded a privileged status under zoning ordinances, and if so the extent thereof leads to the conclusion that the position that each state

takes in this field has its foundation principle in the public policy of that state. New York's public policy was enunciated by Judge Frossel in *Matter of Diocese of Rochester* v. *Planning Board, supra,* when he said at p. 522:

> "Thus, church and school and accessory uses, are, in themselves, clearly in furtherance of the public morals and general welfare. The church is the teacher and guardian of morals (State ex rel Synod of Ohio v. Joseph, 139 Ohio St. 229, supra), and 'an educational institution, whose curriculum complies with the state law, is considered an aid to the general welfare' (Archbishop of Oregon v. Baker, 140 Ore. 600, 613 supra)."

and by Chief Judge Conway in *Matter of Community Synagogue* v. *Bates, supra,* at p. 458 with the following words:

> "The position of the Village, as stated clearly in its brief (pp. 12-14), is that the board of appeals, under the provisions of the ordinance here, should have the power to deny an application for the location of a church at a 'precise spot'. This would not, of course, prohibit the use, erection, alteration, or improvement of buildings or structures for churches and synagogues, in municipalities such as the intervenor, but would limit it. While many may be tempted to think that the solution offered by the intervenor is excellent, when one thinks it through one realizes that, if the municipality has the unfettered power to say that the 'precise spot' selected is not the right one, the municipality has the power to say eventually which is the proper 'precise spot'. That, we all can see is the wrong solution. The men and women who left Scrooby for Leydon and eventually came to Plymouth in order to worship God where they wished in their own way must have thought they had terminated

> the interference of public authorities with free and unhandicapped exercise of religion. We think that we should accept the fact that we are the successors of 'We the people' of the Preamble to the United States Constitution and that a court may not permit a municipal ordinance to be so construed that it would appear in any manner to interfere with the 'free exercise and enjoyment of religious profession and worship'. (N.Y. Const., art. I, § 3).

Certainly, the desire to accord to religious institutions the constitutional guarantee of free exercise of religion influences a states public policy, but New York's concern on this point does not have its genesis solely in the First Amendment of the United States Constitution because Article 1, Section 3 of the New York State Constitution provides:

> "The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall be forever allowed in this state to all mankind; . . . ."

New York chooses to emphasize the inspirational values of religious institutions by recognizing that by their very nature they are in furtherance of the public health, safety and general welfare and so are entitled to a privileged status. Other states, while acknowledging these factors, may determine that they do not outweigh the desire to preserve the purely residential character of neighborhoods and elect not to defer to them. So long as neither view serves to abridge religious freedom, it would seem there is no substantial federal question presented when a state decides to follow either course of conduct.

CONCLUSION

The petition for a writ of certiorari should be denied for lack of a substantial federal question.

Dated: Great Neck, N. Y., May 24, 1976.

Respectfully submitted,

JOHN M. FARRELL, JR.,
Attorney for Respondents.

SCHIFFMACHER, CULLEN & FARRELL
Of Counsel